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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*,
Petitioners,

v.

2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether, following the reformation of the District of Columbia court system in 1970, the Supreme Court continues to have certiorari jurisdiction over all cases arising in the local courts, including those involving the construction of local statutes and common-law rulings.

2. Whether there exists in the District of Columbia in the sale of apartment units in a cooperative development a fiduciary duty on the part of the seller toward the buyer.

3. Whether, constitutionally, one chargeable with breach of an alleged fiduciary duty that was non-existent (or not known to exist) at the time of its occurrence may be punished by the assessment of punitive damages and attorney's fees.

4. Whether, under the doctrine of separation of powers, the court, rather than the legislature, may set public policy by decreeing what contract clauses may be used in a deed of trust.

5. Whether, following contract rescission in the District of Columbia, the parties must be restored to the *status quo*.

6. Whether the failure to restore to the seller eleven apartment units following contract rescission, and instead transferring title to the buyer without payment constituted a divestiture in violation of due process.

LIST OF ALL PARTIES TO PROCEEDINGS, AS REQUIRED UNDER SUPREME COURT RULE 21.1(b)

WISCONSIN AVENUE ASSOCIATES, INC.
VAL MANAGEMENT COMPANY, INC.
METROPOLITAN MORTGAGE BANKERS, INC.
ALEKSANDRS V. LAURINS
JAMES G. NORMAN
CHARLENE BADEN
CAROL A. TOMPKINS
WAYNE A. CHASEN
REAL ESTATE EQUITY MANAGEMENT, INC.
SCENIC TRAVEL, INC.
REAL DEVELOPMENT MANAGEMENT, INC.
CONFERENCE MANAGEMENT GROUP, INC.
SECURITY NATIONAL BANK

Petitioner-Defendants

v.

2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC.
DAVID C. SPRIGGS
H. JAMES ZELLERS
JOHN BRIAN DALY
PETER C. WOODFORD
STEPHEN L. WILKINS
ABBAS ABUTAA
MICHAEL P. ARRA
ANGELO L. BARDINE
PAULA B. BELL
C. M. BROUTSAS
THOMAS E. COLER, JR.
G. DAVID CRANE
CECILE de ROCHEFORT
GERALDINE GARRITY

JAMES C. HASSAN
RONALD L. HAYES
SACHIKO KAWAGUCHI
MARGARET MCMANUS
CATHERINE G. MORAN
CHRISTIE S. ROGERS
VIVIANE RUSSELL
VERDELIA F. SCOTT
JOYCE K. TURNER
L. J. WELLS
WILLIAM L. WOLFE

Respondent-Plaintiffs

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2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The Petitioners, Wisconsin Avenue Associates, Inc., et al., pray that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above-entitled case on February 2, 1982.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 441 A.2d 956. The opinions of the Superior Court of the District of Columbia are reported at 106 Wash. L. Rptr. 1417 (liability) and 107 Wash. L. Rptr. 117 (damages).

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on February 2, 1982. The order denying Petition for Rehearing and Rehearing En Banc was entered February 23,

1982. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under § 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article V, Amendments to the Constitution, provides in part:

> No person shall . . . be deprived of life, liberty, or property without due process of law. . . .

The pertinent provisions of the District of Columbia Code, §§ 1-221, 1-227, 1-241, 1-242, and 11-101, are set forth in the Appendix, p. 94a.

Title 28 of the United States Code, Section 1257, is set forth in full text in the Appendix, p. 94a.

STATEMENT

Respondent, a District of Columbia cooperative housing association known as 2720 Wisconsin Avenue Cooperative Association, Inc. ("Cooperative"), and 25 of its members brought suit in the D.C. Superior Court against petitioner, Wisconsin Avenue Associates, Inc., a real estate developer ("developer"), and some of its officers and associated companies, for, *inter alia*, breach of contract, fraud and breach of fiduciary duty, in connection with the purchase from the developer of an apartment building and its individual units.

Following a nonjury trial (bifurcated on the issues of liability and damages), the court found for the plaintiffs in breach of contract and fiduciary duty, and ordered cancellation of certain corporate indebtedness, transfer of title to a number of apartment units, invalidation of several provisions of the deed of trust, and awarded nominal and punitive damages, and attorneys' fees and litigation expense.

I

In November of 1974, the developer, through a nominee, purchased from the record title holders, Marjorie J. and Henry Jawish, a 49-unit apartment building located at 2720 Wisconsin Avenue, N.W., Washington, D.C., for the sum of $750,000, consisting of a cash downpayment of $75,000, the assumption of two existing mortgages, and the issuance of a third mortgage. The developer's purpose was to convert the building from a rental project to a cooperative housing complex in which the apartment units would be sold to individual purchasers (App. 3a).

The sales contract for the building proceeded to final settlement on December 6, 1974 (App. 30a). The developer at that point had several avenues of approach for moving forward with the project.

Under one option, it could take title directly in its own name and proceed with the sale of the units. When all had been sold, it then would turn over the complex to the apartment owners upon whatever plan or formula may have been devised for the operation of the cooperative on its own.

The developer adopted a variation of that plan. Instead of waiting until all the units had been sold, it set up at the outset in separate corporate form what eventually would become the cooperative association, the respondent, 2720 Wisconsin Avenue Cooperative Association, Inc. (App. 33a).[1]

The developer then proceeded, in implementation of the adopted plan, to turn over (sell, in effect) the project to Cooper-

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[1] As was pointed out at the trial, the arrangement adopted had much to commend it in the way of substantial cost savings and tax benefits to the cooperative (App. 34a; R. ____). But whether the developer operated through a single corporation or as in this case two corporations — the legal effect was the same. As the sole owner, it was free to deal with the property and to dispose of it upon whatever terms and conditions it saw fit.

ative,[2] conferring upon it right, title, and interest at a price equivalent to what was projected as the return to be realized upon a total sellout.[3]

Cooperative, which at that stage was nothing more than an empty shell, without resources, had no way of paying for the property. Instead, it gave the developer a purchase-money mortgage in the amount of $945,000 as partial payment. As for the balance due, the differential between the deferred payment (the mortgage indebtedness) and the sales price, since Cooperative had no sales organization which would enable it to do the selling itself of the 49 units in order to generate the funds necessary to complete the purchase — it fell upon the developer to do the job, which in lieu of cash took payment in kind (Cooperative upon obtaining title immediately re-conferred upon the developer 100% ownership, each evidenced by an individual "Mutual Ownership Contract," of the 49 apartment units), and thereupon proceeded to convert the units into cash proceeds from which it would be and was enabled to collect the balance of the purchase price. Also, as part of the purchase price, Cooperative assumed an indebtedness of $100,000, and later $5700, in the form of two unsecured promissory notes issued to the developer, representing the downpayment ($75,000), and settlement charges and renovation costs ($30,700) (App. 4a).

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[2] Actually, from the technical standpoint, under the legal mechanics employed to accomplish the purpose, the developer arranged for title to pass directly from the Jawishes to Cooperative, with the latter supplanting the developer, and/or its nominee, as the purchaser of the property (App. 31a).

[3] According to trial testimony, a total sellout would have produced a gross approximating $1,300,000 or an average of $26,000 per unit (one was a double unit). (App. 31a). From that figure would be deducted selling expense, overhead, taxes, legal fees and other costs, all to be borne by the developer and not Cooperative. The resultant figure would represent the developer's net earnings on the project. (App. 58a, 67a).

All of these arrangements were spelled out in a series of agreements entered into between the parties in December, 1974 (App. 99a-110a).

The first sale of an apartment unit occurred in May 1975 (R. ____). All told, approximately 80% of the units were sold in 1975, and through March of 1976, when the lawsuit was filed, only eleven units remained unsold.

In January of 1976 the apartment owners were advised of a forthcoming increase in the monthly maintenance fee for the ensuing fiscal year. Some of it was due to routine increases in utilities, repairs, etc., and fell within normal limits. There was also an extraordinary assessment of $8,000 for roof repair occasioned by storm damage (R. ____).[4]

But it was the presence of a third element in the new budget that became a focal point of controversy between the apartment owners and the developer, and actually was the precipitating factor in the lawsuit.

The new budget lacked two non-recurring "income" items which in the previous year's budget had served to offset overall expenditures in that budget.[5] The loss of that windfall in non-recurring items in the new budget meant that apartment owners had to make up the shortfall between what was needed and what was available to meet operating expenses for the new year. That differential averaged out to $26.83 per month for each apartment unit.

The apartment owners objected strongly to the increase, asserting that the developer had not made this clearly under-

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[4] As it would appear, there was insurance coverage on this loss, and a settlement was achieved with the insurance company. The record does not disclose the amount of the settlement (R. ____).

[5] The two non-recurring items were $9200 in membership fees and $6900 in first-year principal payments which had been deferred for that first year (App. 5a).

stood at the outset. In response, the developer pointed to what it considered ample sales information at the time of sale, which should have provided sufficient notice. Despite efforts to mediate the controversy, the apartment owners, nevertheless, proceeded to place the matter in the hands of attorneys. Thereafter, legal counsel, purporting to proceed on the basis that a fraud of enormous proportions had been perpetrated, lost no time in launching a massive lawsuit against the developer and its associates.

II

The court rendered two opinions in the case, one on June 27, 1978 following the liability trial, and the other on December 18, 1978 at the close of the damages trial (App. 26a, 62a). In holding for the plaintiffs, it found no fraud or any compensable damage at all (App. 6, 84a). Eventually, it awarded plaintiffs $26.00 in nominal damages ($1.00 for each plaintiff) (App. 84a). In its assessment of the matter, however, the court made a pivotal determination that colored its entire perception of the case and became the dominant factor in its thinking in arriving at its ultimate conclusions. The court declared that the seller (the developer) in this case was not an ordinary seller but was one clothed with the mantle of a fiduciary (App. 32a-35a). The conversion of the developer into a fiduciary had profound and incalculable repercussions that were critically detrimental to the developer's cause and the outcome of the case. Normal practices and procedures that would be considered perfectly acceptable on the part of the seller acting in his own right and contractual interests would be viewed as self-dealing and overreaching if pursued by a fiduciary.*

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* As described by Judge Cardozo in *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928):

> A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor most sensitive, is the standard of behavior.

With that as the guiding standard, the court turned to other avenues for possible recovery. (a) It cancelled the mentioned corporate indebtedness of Cooperative of $100,000 and $5700 in the form of two promissory notes owed to the developer, assertedly because of inadequate disclosure (liability opinion) (App. 39a-42a). Later, however, in its damages opinion, apparently changing its mind, it grounded its nullification of the notes upon lack of consideration (App. 64a-70a).[7] (b) it invalidated four clauses of the Deed of Trust as being contrary to public policy (App. 6a), (c) it declared that the developer had made inadequate disclosure in the maintenance-fee situation (App. 6a), (d) acting *sua sponte*, it found breach of contract in reference to eleven apartment units because the developer allegedly failed to obtain the approval of Cooperative when it sold or leased-optioned the units.[8] As a remedy, it declared the contracts pertaining to those units rescinded and ordered transfer of title of the units to Cooperative.[9] (e) Because of the

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[7] When we demonstrated in our Appeals Brief that the $105,700 had been consumed on the project ($75,000 cash downpayment and $30,700 in settlement expense and renovation cost), (R. ____). the Appeals Court reverted to the inadequate-disclosure thesis (App. 6a).

[8] The fact is, contrary to the court's ruling, under the terms of each of the Mutual Ownership Contracts (one for each of the 49 units), the developer was expressly exempt from obtaining such approval. In paragraph one, it was stated:

> 1. . . . The restrictions against transfer or rental shall not apply to Wisconsin Avenue Associates, Inc., or to any lender. . . . (App. 105a)

[9] The court unveiled this ruling in its final opinion in the case on December 18, 1978. There was no word of warning or intimation that it was about to act, no consultation with counsel or opportunity to be heard. Perhaps more significantly, at no time did plaintiffs, even at the peak of the proliferation of charges against the defendants in their encyclepedic complaint suggest anything along that line. The court itself conceded that "no specific allegations [were] made in plaintiffs' amended complaint under the contract breach theory" (App. 67a-69a).

The court's procedure left much to be desired in its failure to pay even lip service to the law's most abiding principle — procedural due process.

alleged breach of fiduciary duty regarding the $100,000 note, the court awarded $30,700 in punitive damages to plaintiffs, and (f) in regard to the maintenance-fee issue, it assessed punitive damages of $500 per purchaser, or $12,500 (App. 8a). (g) It awarded plaintiffs $124,245.16 in attorneys' fees and $9974.78 in general costs (App. 8a, 22a-23a). [10]

Final judgment was entered April 27, 1979. Appeal to the D.C. Court of Appeals followed.

III

STAGE OF PROCEEDINGS WHEN ISSUES WERE RAISED

A. The Issue Concerning Fiduciary Duty

Petitioners denied existence of such a duty in (1) their answer to the complaint, filed July 30, 1976 (App. 96a), (2) Defendants' Opposition to Motion for Summary Judgment, etc., filed June 21, 1976 (R. ____), (3) Defendants' Proposed Findings of Fact and Conclusions of Law, filed May 16, 1978 (App. 96a), and (4) Appellants' Brief in D.C. Court of Appeals. (App. 96a).

B. On The Question Of The Court's Authority Constitutionally To Impose Punitive Damages For Violation Of A Fiduciary Duty Previously Unknown

Petitioners raised this initially on a Petition for Rehearing and Rehearing En Banc, filed with the D.C. Court of Appeals, and was made in supplement of the primary contention that no such duty existed. (App. 97a). The Appeals Court denied the rehearing petition.

Errors of law advanced for the first time on appeal are reviewable by the D.C. Court of Appeals as a matter of discretion. *Christian* v. *U.S.*, D.C. App., 394 A.2d 1, 24 (1978).

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[10] The court also allowed defendants $21,334.10 in renovation costs and $9365.90 in closing costs by way of *quantum meruit* (App. 8a).

While there is nothing in the record disclosing one way or the other whether the issue was "received" and recognized by the Appeals Court as properly before it — a factor necessary to lay a foundation for later Supreme Court review — the strong presumption is that it did accept the issue as simply another point to be considered along with those already before it.

1. The issue involved fundamental rights, and therefore was not one likely to be cast aside, especially since the court was already considering the basic question concerning fiduciary duty, and no particular inconvenience would be entailed in taking up what was nothing more than an added reason in support of the main question.

2. The litigation was a protracted one in which untold resources necessarily had been expended by petitioners in their defense. Their "day in court" should not be circumscribed unduly — and thus it is not to be inferred in the circumstances that the court would stand upon strict ceremony in the presentation of the issues.

3. The court throughout the appeal did not adopt a technical attitude, and for all apparent purposes seemed willing to hear the parties out. Therefore, rejection of an important constitutional question on a procedural technicality would seem out of focus.

4. The Appeals Court itself, as we alluded to earlier, adopted a legal conclusion that the trial court had abandoned (the basis for nullification of the $100,000 note). Ante, at p. 7. Such action, it would appear, set the ground rules with respect to this particular case.

Apart from the foregoing, and assuming that the Appeals Court had rejected for reasons of untimeliness consideration of the issue — we suggest that its refusal to entertain the proposition, in the circumstances, would not serve to remove it from the "agenda" and defeat the Supreme Court jurisdiction.

We do not suggest that state (or District of Columbia) courts must open their doors to uninhibited demands for consideration of supposed constitutional rights limited only by the imagination of the claimant. Time limitations and procedural guidelines within the rule of reason are entirely in order.

As for the other side of the coin, state courts must not be unduly restrictive or technical in limiting their consideration of such matters, particularly where the asserted right is a substantial one and the convenience of the court is not seriously affected.

Without belaboring the point, we submit that such a refusal on the part of the Appeals Court here would have been unnecessarily harsh in the circumstances and in itself a denial of important rights. See *Newport* v. *Fact Concerts, Inc.*, 443 U.S. 247, 255-257 (1981) (failure to object to jury charge at trial does not foreclose challenge to instruction on later appeal).

C. On The Issue Of The Court's Authority To Set Public Policy In Reference To Clauses Permissible In Deeds Of Trust

This was brought up initially in petitioners' main brief before the Appeals Court (App. 97a). No question was ever raised or objection made at any time in the course of the appeal concerning the timeliness of the claim. From all indications, it became a part of the *res* on the appeal, and thus cognizable as such on the later review of this Court. *Orr* v. *Orr*, 440 U.S. 269 (1978) (failure to object to timeliness of the presentation cures the procedural lapse) *Newport* v. *Facts Concerts, Inc., supra*, at 255-257.

D. On The Issue Regarding The Court's Failure Following Contract Rescission To Restore The Status Quo

This point, of necessity, was brought up on the appeal in petitioners' main brief before the Appeals Court (App. 97a, 98a).

As we discussed earlier (ante, at p. 7, n.9), the contract breach relied upon by the court had never been alleged in the body of the plaintiffs' complaint or otherwise introduced in the lawsuit, and it was only when the trial court in its final opinion in the case, acting *sua sponte*, "found" breach of contract that it became an issue.

In the face of this *fait accompli*, petitioners were relegated to their remedies on appeal.

E. On The Issue As To Whether, Following Contract Rescission, The Failure To Restore The Apartment Units To The Seller Constituted A Divestiture Violative Of Due Process

1. This constitutional question, as distinguished from the contractual issue discussed in the preceding paragraph, was brought up initially on the Petition for Rehearing and Rehearing En Banc before the D.C. Court of Appeals (App. 98a).

Up until the time of the Appeals Court decision, petitioners had regarded the matter simply as being one in contract, i.e. that the trial court merely had failed to apply the correct rule regarding contract rescission. But when the Appeals Court affirmed the decision below and refused to intercede in the matter, despite the manifest error, the issue developed constitutional overtones and emerged as a basic denial of due process in violation of the Fifth Amendment. At that stage, our only recourse was to bring the matter up on a Petition for Rehearing and Rehearing En Banc.

In circumstances such as these, it is not too late to raise the issue. See *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 367 (1932).[11]

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[11] In *Great Northern Ry. Co.*, the Court (per J. Cardozo) held that the general rule that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing does not apply "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right."

2. In the said Petition for Rehearing, we refer to the ruling as a "divestiture," as an "expropriation of over $400,000 in assets," and as "an abandonment of the rule of law," without mentioning the term "due process" or citing specific provisions of the Constitution. (App. 98a).

We submit that that was sufficient to alert the court of the problem and its essential constitutional pertinency. *N.Y. ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *Street* v. *U.S.*, 394 U.S. 576 (1969). [12]

In any event, this Court, by reason of its general supervisory authority over the D.C. courts, would have the inherent power to entertain claims of alleged error even though advanced for the first time on appeal — and theoretically, even before this Court. This is in contrast to suits filed in the state courts, inasmuch as in those situations the federal authority would have no jurisdiction under the Constitution to intrude upon the affairs of the states (the federal government being one of limited powers) unless a clear federal interest has manifested itself.

In brief, in regard to the D.C. cases, it is a matter of judicial discretion, not basic power or jurisdiction. *Newport* v. *Fact Concerts, Inc., supra*, at 255-257. *Pernell* v. *Southall Realty*, 416 U.S. 363 (1973); *Fisher* v. *U.S.*, 328 U.S. 463 (1946).

REASONS FOR GRANTING THE WRIT

There is the substantial question at the threshold of the Court's certiorari jurisdiction in cases arising in the local courts of the District of Columbia that remains unresolved. The instant proceeding is a singularly appropriate vehicle for the purposes of that determination since it encompasses the full spectrum of

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[12] In *New York ex rel. Bryant*, it was stated:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with precision. . . . If the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

cases — constitutional, statutory and common law — that may arise. Whether the review process is pursuable to the Supreme Court in all cases or whether in particular areas it ends with the D.C. Court of Appeals — is a matter that should be reduced to certitude. (Note J. White dissent in *Key* v. *Doyle*, 434 U.S. 59 (1977).

As for the substantive issues presented, we will confine our remarks to three basic areas which in our judgment have broad public impact and raise important constitutional questions. [13]

I

The Question Of The Court's Certiorari Jurisdiction In Local Cases Following The 1970 Reformation Of The D.C. Court System

Following the reformation of the D.C. court system in 1970, [14] the Supreme Court's certiorari jurisdiction in local cases — constitutional, statutory and common-law — has remained essentially undefined and unresolved. The Court has not had occasion to pass in any significant way upon the substantial issues presented in this important area of the law. [15]

It is the contention of the petitioners that pursuant to § 1257(3), this Court retains, as it has had in the past, certiorari jurisdiction in all cases emanating from the local court system. [16]

In *Key* v. *Doyle*, *supra*, at 61 the Court held that no mandatory appeal will lie under § 1257(1) in cases involving federal statutes applicable solely to the District of Columbia even

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[13] This litigation produced multitudinous issues of complexity and diversity, all of which were addressed by the petitioners in comprehensive briefings before the D.C. Court of Appeals.

[14] The District of Columbia Court Reform and Criminal Procedure Act of 1970. 84 Stat. 473 (1970).

[15] The Court touched tangentially upon one facet of the problem in *Key* v. *Doyle*, *supra*, as we will presently discuss.

[16] The text of § 1257(3) is set forth in the Appendix, p. 94a.

though they may result in nullification of the statute on constitutional grounds. [17]

In *Palmore* v. *United States*, 411 U.S. 389 (1973), the Court, in construing a companion section, § 1257(2), concluded that no mandatory appeal in D.C. cases involving the validity of provisions of the D.C. Code will lie because the mentioned Section pertains solely to state statutes and, accordingly, in no manner would it be possible to construe a congressional enactment — though applicable exclusively to the District of Columbia — as a "state" statute without further clarification from the legislature.

The Court did hold, however, that while D.C. cases involving the constitutionality of local statutes were not appealable as of right either under § 1257(1) or § 1257(2) — they were reviewable under the Court's certiorari jurisdiction pursuant to

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[17] § 1257(1), it is to be noted, provides for mandatory review in all cases where the highest court of a state (including the District of Columbia) has declared a "statute of the United States" unconstitutional. At first blush, it would appear that any act of Congress, whether it applied nationally or merely to a single precinct, would fall within the term "statute of the United States." The Court, nevertheless, declined to accept this language at face value, presumably because (a) Congress has afforded the District of Columbia a measure of autonomy or home rule and, hence, in line with the status of the several states, District affairs have been divorced from those of its parent, the United States, and, thus, local statutes in a sense were no longer federal matters. The problem faced by the Court in arriving at its conclusion was that Congress did not get around to making that distinction in § 1257 (1); moreover, the severance between the entities was not all that pronounced, since the District remains as the capital of the nation, with all the attendant implications of continuing, pervasive congressional control, (b) the Court did not relish the prospect of dealing with an uncontrollable flow of cases from the District to add to its already heavy burdens, particularly when the controversies that would arise, more likely than not, would be relatively innocuous. That is not a factor to be taken lightly, although it perhaps may be doubted that the D.C. Court of Appeals, with regularity, will engage in such action (i.e. the invalidation of D.C. statutes).

§ 1257(3). *Key* v. *Doyle*, at 68, *Palmore* v. *United States*, at 396. [18]

In the suit at bar, petitioners make claim under the Constitution, statutory law and the common law, and submit that all three categories are cognizable under the Court's certiorari jurisdiction established under § 1257(3). [19]

The constitutional and statutory claims are assertable under the language of § 1257(3) providing for such review where 'any

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[18] In *Key*, the Court, in dismissing the appeal, assumed certiorari jurisdiction by treating the papers as a petition for writ of certiorari (as authorized under 28 U.S.C. § 2103). Id., at 68, n.15. It then denied the petition. The case involved the nullification of a D.C. statute upon constitutional grounds. The petitioner's claim in this Court, therefore, was founded upon the upholding of the validity of a local statute. But there is no language in § 1257(3) providing for certiorari review of D.C. statutes or their validity, but only of a "statute of the United States," which the Court already had declared in its construction of § 1257(1) did not encompass "a law applicable only to the District of Columbia." Id., at 61. The only conclusion to be drawn from this is that, contrary to the holding arrived at in § 1257(1), acts of Congress applicable exclusively to the District were embraceable after all within the term, "statute of the United States," at least for the purposes of § 1257(3).

Of course, where the D.C. courts uphold a local statute, an aggrieved party in such a case, citing unconstitutionality, ostensibly would have recourse for certiorari review by invoking the language contained in § 1257 (3) that a "right . . . claimed under the Constitution" had been denied. See *Pernell* v. *Southall Realty*, 416 U.S. 363 (1973).

[19] Petitioner's statutory claim is founded upon the doctrine of separation of powers which has its genesis in the District of Columbia charter setting up a ruling authority distributed among three branches of government — legislative, executive and judicial. District of Columbia Code, §§ 1-221, 1-227, 1-241, 1-242, and 11-101.

title, right, privilege or immunity is . . . claimed under the Constitution. . . . or statutes of . . . the United States."[20]

Petitioners' claim under the common law presents a more difficult question.[21] The problem is that the jurisdictional statute, § 1257(3), has been framed in the context of claims asserted under the Constitution, federal statutes or treaties, with no mention made of cases arising under the common law. The only language in the Section of sufficient breadth to accommodate a common-law claim is that providing for review in cases where "any title, right, privilege or immunity is . . . claimed under . . . authority exercised under, the United States."

Spelled out, the argument would be that the local D.C. courts constitute "authority exercised under the United States," and that the improper exercise of that authority — erroneous rulings — is reviewable by the Supreme Court under writ of certiorari.

We suggest that the language, above cited, coupled with the general supervisory authority traditionally exercised by the Court over the affairs of the District — and presumably continues to exercise in the absence of explicit directive to the contrary — provides sufficient foundation for the indicated appellate review.

To revert briefly to the early history of this country, the District of Columbia occupies a unique place in the fabric of government fashioned under the Constitution. It is the area set aside under that document as the seat of government, and

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[20] As we noted immediately above (n.18, *supra*), the term "statutes of . . . the United States," as contained in § 1257(3), embraces local statutes — an inescapable conclusion to be drawn from the Court's holding in *Key* v. *Doyle*.

[21] Petitioners' common-law claims are based upon (a) the court's imposition of an unprecedented fiduciary duty upon a seller toward his buyer, and (b) the court's failure upon contract rescission to restore the parties to the *status quo*.

represents the embodiment of the federal presence as the sovereign power and paramount authority. Territorially and conceptually, the District of Columbia and the federal entity were conceived as being one and the same. There can be no cleavage or realistic divorcement between the District and the United States. Without the District as a territorial base, the national sovereign would end up as a shadow government without form or substance. That was the situation that confronted the founding fathers when it was finally determined that a permanent home — a distinct, independent land base — was crucial for the maintenance and orderly administration of the affairs of government. Prior to that, the government found itself shuttling between New York and Philadelphia, with barely more than squatter's rights in an alien territory, beleaguered and hanging on at the sufferance of its landlords, the local governments. It was to put an end to that intolerable state of affairs that the framers of the Constitution decreed the carving out of a federal enclave in which the federal authority would reign supreme, answerable to none save Congress. Article 1, § 8, cl. 17 of the Constitution. [22]

The terminology employed in the provision — that Congress is to exercise "exclusive legislation in all cases whatsoever over such district" — is noteworthy. It would be difficult to envisage language more explicit or unequivocal, or less amenable to the erosions of construction. Congress, it was decreed, was to do the legislating for the District — there was to be no delegation of authority to lesser bodies. On its face, the mandate, exercised in full measure, would rule out any suggestion of home rule, since that would mean that persons other than Congress would

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[22] The provision states in part:

> To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress become the seat of Government of the United States. . . .

be engaging in the law-making process. There is no turning back of the clock, of course, but as a benchmark of the limited authority of Congress to shunt off its solemn obligations under the Constitution, it stands as a transcending element in the construction of statutes dealing with the District, and the intendment of Congress in the passage of such statutes. In simple terms, no statute, perforce, is to be construed as reducing, weakening or relinquishing the federal role (and that includes the Supreme Court) in the governing of the District of Columbia. [23] If Congress does have any such purpose in mind, it should be compelled to say so, and not leave it to conjecture. It may not be accomplished, *sub silentio*.

In 1970, pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970, *supra*, there was a restructuring of the judicial system in the District of Columbia. One of the modifications was the discontinuance of the channeling of appeals from the local courts (including the D.C. Court of Appeals) through the U.S. Court of Appeals for the District of Columbia. Henceforth, decisions of the D.C. Court of Appeals were to proceed directly to the Supreme Court for review. *Key* v. *Doyle*, *supra*, at 64; *Palmore* v. *U.S.*, *supra*, at 392, n.2.

Prior to 1970, all local cases reaching the U.S. Court of Appeals were reviewable in the Supreme Court by writ of certiorari pursuant to § 1254(1), *Key* v. *Doyle*, at 63. And that was true even though they involved merely local statutes or common-law rulings having strictly local effect.

The mechanics for effectuating the aforementioned shift in the D.C. appeal process was to remove the D.C. cases from § 1254(1) to § 1257. The question that now presents itself is

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[23] If the full panoply of federal authority reigns, then, presumptively, the judicial authority (the Supreme Court) would follow in its wake. It would be strange, indeed, where federal power holds full sway, to remove the third branch of government, the court, from its customary and indispensible role.

whether in making the transfer from one Section to the other, something was lost in the process, that is, whether D.C. litigation not involving claims under the Constitution or the validity of federal statutes, but pertaining solely to the construction of local statutes or to common-law rulings of the local courts, formerly reviewable in the Supreme Court by writ of certiorari, as above-noted, remain so following the reformation.

We submit that the answer should be in the affirmative. No pre-existing review authority was lost, for the reasons already stated.

But beyond that, there are other considerations that militate against such a determination.

A. The affairs of the District may never be regarded as being so parochial that they do not even warrant certiorari jurisdiction. District affairs, unlike those of other localities, have a way of intruding upon the order and tranquility of the federal establishment. Garbage collection, police and fire department services, for instance, while eminently local in character, impeded by strikes or other stoppages, would impinge heavily upon the safety and security of the state. That is not to mention the familiar mass demonstrations and other political actions directed both against the United States and the international community, the latter so dependent upon its host government for protection and sanctuary. It is idle to state in the face of the manifest federal interest that the Supreme Court would be helpless to intervene or that Congress would ever so contemplate.

b. It is self-evident in the light of the lessons of the past that to delegate to a local government or one of its branches (in this case, the D.C. Court of Appeals) ultimate authority to the exclusion of those responsible under the Constitution for the conduct of national affairs would be the height of unwisdom. The well-being of the national government ought not to be made

dependent upon the local authorities or their constituencies, or made hostage to their whims and caprices.

II

The Ruling That A Seller Of Apartment Units In A Cooperative Development Owes A Fiduciary Duty To The Buyer

A. The court's perception of the buyer-seller relationship in the present situation is a distortion of the actual fact. The court read into it an element that did not exist between the parties. There is nothing in their juxtaposition that warrants any inference that the seller had become a fiduciary, trustee, guardian or protector of the buyer. At the time of the purchase, the parties were dealing as ordinary buyers and sellers, which is to say, at arm's length under the doctrine of *caveat emptor*. No one considered it to be otherwise.

The court below in support of its thesis of fiduciary duty cited a number of corporate cases and the corresponding duty of corporate officers and promotors to their stockholders and investors in the management of company affairs.[24] The cases are clearly distinguishable and have no application to the suit at bar. Here, unlike the situation existing in those cases, the developer was not inviting the public to join with it and invest its funds in a common enterprise or ongoing business project for the mutual benefit of all. All it was doing was selling apartment units. The clear understanding was that developer, upon the completion of the sale of the units, would withdraw from the scene and relinquish control to the new ownership — no different in principle than in any other sale of real estate or other property. Its only obligations were those attributable to an

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[24] *McCandless* v. *Furlaud*, 296 U.S. 140 (1935); *Post* v. *U.S.*, 132 U.S. App. D.C. 189, 407 F.2d 319 (1968). But cf. *Old Dominion Copper Co.* v. *Lewisohn*, 210 U.S. 206 (1907) (per J. Holmes), representing a line of authority to the contrary.

ordinary seller, i.e. that it not engage in fraud or misrepresentation and that it honor its contracts. [25]

Over the many years of condominium and cooperative apartment construction, there is not a single court in the United States to our knowledge, aside from the court in this case, holding that a fiduciary duty on the part of the builder-developer devolves on behalf of the buyer. In the only case that has come to our attention actually presenting the issue, the New York Court of Appeals in 1957 repudiated the notion that any such duty existed. *Northridge Cooperative Section No. 1* v. *32nd Avenue Construction Co.*, 2 N.Y. 2d 514, 141 N.E. 2d 802, 161 N.Y.S.2d 404 (1957). [26]

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[25] We are referring to the situation existing in the formative stages of the project prior to the sale of the first unit. Of course, after the purchase of a unit, a fiduciary relationship between the particular buyer and seller would emerge, but it would be one limited to the developer's stewardship in the period following the sale until relinquishment of control upon sale of the last unit.

[26] The court stated in part:

> We fail to see how they [defendants] would be under any fiduciary obligation to the future tenants in these initial stages. . . .
>
> The fact that the promotor is interested in the landlord company as well as in the plaintiff, when the ground lease was made, or in the building construction company, when the contract for the erection of the building was entered into, would add nothing to any cause of action based upon breach of fiduciary duties. Self-dealing at this stage was proper. In fact, the promotor alone was interested, until the loan was approved and the tenants purchased their apartments. . . .
>
> Up until the time when the tenants subscribed for their apartments, the situation was legally the same as in the initial stages of corporate promotion work. To a point in such transactions, no one is legally interested, except the organizers.
>
> . . . It would not be equitable to permit plaintiff, after it came into control of the tenants, to attempt to reduce the ground rents or show the excessive cost of the building on the theory that the directors of plaintiff at the times these costs were agreed upon owed fiduciary duties to tenants, whose rights had not come into existence, to secure lower prices. 2 N.Y. 2d, at 527; 141 N.E. 2d, at 807; 161 N.Y.S. 2d, at 411.

The conversion of the developer from one of ordinary seller to that of fiduciary had grave consequences that ultimately proved fatal to its cause. Normal practices of the marketplace that would be considered perfectly acceptable on the part of a seller acting in his own right and interest would be regarded as dishonorable and perfidious if pursued by a fiduciary.

It is submitted that neither in law nor in logic is there basis for the extraordinary conclusion that a fiduciary duty existed in this case on behalf of the buyer.

B. In any event, regardless of how the question eventually is resolved the fact is that the ruling was unprecedented — the concept of a fiduciary duty in the context of this case was unknown in the District of Columbia and elsewhere, and marked a radical departure from custom and common understanding. It represented an abrupt, abrasive changing of the rules in mid-stream. Unlike the legislative process, the judicial *modus operandi* is inherently oppressive — that by reason of its *ex post facto* application and the lack of notice to the putative offender.

We have a prime example of that in this case which had particularly untoward aspects. Not only was the developer charged with violation of a duty that was non-existent (or at least not known to exist) at the time of the alleged offense, but it actually was severely punished for its disobedience. The imposition of punitive damages and on top of that the exaction of crushing attorneys' fees (in addition to its own crippling litigation expense) was monstrous. Assuredly, serious questions are raised of due process violation under the Fifth Amendment. It would be difficult to conceive of a greater unjustice than to hold one answerable for a wrong that was not a wrong, or pronounced as such, until after its occurrence. Such procedure, as we see it, strikes at the very heart of our constitutional system.

III

The Lower Court's Usurpation Of Legislative Functions When It Purported To Establish Public Policy Regarding The Type Of Clauses Permissible In Deeds Of Trust

The four provisions nullified by the trial court had to do with (a) holding the developer-mortgagee harmless from attorneys' fees in litigation involving the mortgagor and mortgagee (para. 11), (b) the familiar due-on-sale clause (para. 17), (c) certain restrictions on prepayment privileges by the mortgagor (para. 34), and (d) the expeditious repayment of the mortgage indebtedness in the event the security interest (the deed of trust) was set aside or declared unenforceable (Para. 46). The clauses in full text are set forth in the Appendix, at pp. 111a-112a.

We will not take up the merits of those provisions. It suffices to state that such clauses are familiar ones in the world of mortgage financing and in no sense may they be considered as being beyond the pale. On the contrary, paragraph 11 (attorneys' fees) is one of common usage in the District of Columbia. *Manchester Gardens, Inc.* v. *Great Western Life Assurance Co.*, 92 U.S.App. D.C. 320, 205 F.2d 872 (1953); *In re Wolman*, 314 F.Supp. 703 (D. Md. 1970). The due-on-sale clause (para. 17), which simply requires the mortgagor to pay off the mortgage if he undertakes to resell his unit, is the prevailing rule in the large majority of the states.[27] Nevertheless, the lower court in its purview of decisional law ignored the overwhelming majority view and cast its lot with the isolated minority.[28]

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[27] See e.g. *Malouf* v. *Midland Fed. S. & L. Ass'n.*, 181 Colo. 294, 509 P.2d 1240 (1973); *Gunther* v. *White*, 489 S.W. 529 (1973); *Shalit* v. *Investors S. & L. Ass'n.*, 101 N.J. Super. 283, 244 A.2d 151 (1968). See also *Williams* v. *First Fed. S. & L. Ass'n.*, 651 F.2d 910 (CA 4, 1981), in which the Court of Appeals for the Fourth Circuit upheld the validity of such clauses.

[28] *Nichols* v. *Ann Arbor S. & L. Ass'n.*, 73 Mich. App. 163, 250 N.W. 2d. 804 (1977); *Tucker* v. *Lassen S. & L. Ass'n.*, 12 Cal. 3d. 629, 526 P.2d. 1169 (1974).

Due-on-sale clauses are considered to be of prime necessity for the survival of savings and loan associations, with the United States Government itself in the forefront espousing them.[29] How such clauses may be considered contrary to public policy is beyond understanding.

As for the finding of public policy infringement, the court did not identify the source of the policy in the District of Columbia, or when and where it was conceived, formulated or inaugurated, or what body or entity decreed it. One must conclude that the declared public policy represented nothing more than the *ipsi dixit* of the court itself.

In short, there was no law or legislative expression on the subject in the District of Columbia. Presumably, therefore, it was not unlawful to include them in deeds of trust, at least until the legislature, in its wisdom, took the necessary steps to restrict or totally abolish them. Nevertheless, the absence of law forbidding such practice posed no problem for the court. Undeterred by such fact, it proceeded to pass its own law apparently upon the assumption that what it does not like it may readily nullify at one fell swoop.

Thus, the autonomous action of a single, lower-court judge (sanctioned by the Appeals Court) became the governing law of the District of Columbia in the significant field of real estate. Except for the litigating parties, the voice of the entire body politic was blocked out, its views, wishes, aspirations, inclinations and interests were set adrift.

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[29] In *Williams, supra*, at 914, n.6, the court stated that "the deed of trust forms employed in general represented a nationwide federal policy favoring due-on-sale clauses." The court also raised the possibility that the federal government, "through appropriate actions of Congress and the proper administrative . . . agencies, has fully preempted, pursuant to the Supremacy Clause. . . . any state regulations of due-on-sale clauses in the loan instruments of federal associations." Id., at 921.

It is more than evident that such procedure flies in the face of what this Republic avowedly stands for.

IV

The Court's Divestiture Of Eleven Apartment Units Belonging To The Developer

If there was any single ruling by the lower court that might be considered as an abandonment of the rule of law, as previously known and understood, it was the stripping of the developer of eleven apartment units and handing them over to Cooperative, allegedly because of breach of contract.[30] The breach was non-existent, but we will not dwell upon that point and concede for argument's sake that there actually was a breach. The legal remedy for breach of contract is either the award of damages or contract rescission. By definition, rescission means restoring the parties to their original position — a return to the pre-existing *status quo*.

The lower court chose rescission *(sua sponte)*. Nevertheless, although purporting to proceed under that doctrine, it failed in that objective when it ordained that the units be transferred to Cooperative. Such transfer to Cooperative was not a "complete" rescission since it did not restore the *status quo*. In order to accomplish full-fledged rescission it would be necessary to go one step further and return the units to their original owner, the developer. There is no other way to achieve that result.

To reiterate, the developer was the original owner of the units. When it sold the building to Cooperative which had no resources with which to make payment, it (Cooperative) upon acquiring title immediately gave the developer a purchase-money mortgage (the $945,000 deed of trust) as well as the

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[30] The value of the eleven units (one was a double unit), depending upon conflicting evidence, ranged from $23,000 to $27,000 per unit, or $276,000 to $324,000 in all (R. ____). Present value because of the interim inflation surely would push the figure upwards of $350,000 to $400,000.

right to sell the individual units and to retain the proceeds of sale. The sales proceeds represented the balance of the purchase price.

It would follow from that that if there is to be a cancellation of the deal, or a divisible portion of it, then clearly the building (or that divisible portion) would have to be returned to the starting point, the developer.

Cooperative's "title" is comparable to that of a purchaser of property who upon acquiring title simultaneously confers upon the seller a purchase-money mortgage. If the transaction is rescinded, it is elementary that the property should revert to its original owner, the seller. The purchaser surely would have no claim upon it. That is the rule, universally applied, at common law.

But beyond that, the failure to restore the units to the developer and, instead, conferring title upon Cooperative without payment constituted a deprivation of property "without due process of law" in violation of the Fifty Amendment to the Constitution. [31]

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[31] The Appeals Court disposed of this rather incredible ruling of expropriation of over $400,000 in assets in two paragraphs covering less than a single page (App. 22a). Strange to say, it apparently did not apprehend the nature of the problem or the rudimentary defense that was interposed. Thus, it was averred:

> Appellants claim that the proper remedy would have been to rescind the agreement completely by returning the building to Associates and by cancelling Cooperative's indebtedness.

With that assertion, the panel quickly brushed aside the alleged defense. The fact is that nowhere did petitioners rely upon such a defense. Petitioners never had any quarrel with the idea that the contract was a divisible one, or suggest that a rescission affecting only eleven units was out of order. Quite the contrary, we specifically pointed out that even in those circumstances it would be necessary to return the eleven units to the developer in order to effectuate a complete rescission. To quote from our Brief, p. 33, R. ____ :

> The identical procedure would be required if the contract were considered a divisible one, and only a certain proportion of the forty-nine

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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units was to be affected by rescission. In that circumstance it would be necessary to return the specific units involved in the rescission to the developer from whence they emanated — in this case eleven units — and correspondingly, a proportionate share of the deed of trust applicable to those units would have to be expunged.

In sum, petitioners' defense regarding the eleven units was a far cry from that depicted by the Appeals Court in its opinion.